THE DRUG TRADE AND THE ANTI-TRUST LAW[1]

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Thirty years ago the wholesale drug trade of the United States, was in a demoralized condition. Competition was fierce, especially in proprietary medicines, which constitute more than half of the average drug jobber's business. There was little or no profit on these goods, and with many wholesale druggists it was a severe struggle for mere existence. The situation became so acute that it was absolutely necessary to find a remedy, and about that time the wholesale druggists of the country, all suffering from the disastrous results of excessive competition in proprietary medicines, formed their association. Upon the petition of the association many proprietors of these goods adopted the so-called "rebate plan" in the mutual interest of the jobbers and themselves. Under this plan the proprietor fixed a uniform wholesale price for his goods all over the country, and paid the jobber a rebate therefrom, upon the condition that the latter would not sell below the price; the matter being covered by a contract or agreement between the proprietor and each of his wholesale distributers. This rebate or discount constituted the jobber's entire compensation for handling the proprietor's goods, and the allowance was only a reasonable one, being but little more than the cost of transacting the wholesale drug business. The jobber was thereby insured a steady, although small, profit on proprietary articles, and the cut-throat competition which formerly prevailed in the wholesale drug trade on this class of goods was greatly reduced. The present margin of profit on the wholesale drug business is not to exceed three per cent on the total amount of sales, which is a very moderate return, considering the large capital invested and the technic knowledge required to conduct the business.

[1] A large part of this paper has previously appeared in the Proceedings of the National Conference on Trusts and Combinations under the Auspices of the National Civic Federation, Chicago, October 22-25, 1907.

Organization in the Drug Trade

While the rebate plan provided a reasonable remuneration for the jobber, it gave no protection to the large army of retail druggists who some years later were compelled to sell proprietary medicines practically at cost, to meet the ruinous competition of department stores and the few large retailers who made a specialty of cutting prices on these articles, mainly for the purpose of drawing customers to their stores and selling them other goods on which they made a large profit. In order to assist the rank and file of the retail drug trade, many proprietors adopted, about seven years ago, what was known as the "tripartite plan," under which they required their wholesale distributers to refuse sales of their goods to "aggressive cutters," who insisted upon selling below the prices agreed upon by most of the retailers in their respective communities.

The "direct contract and serial numbering plan" was later adopted by some of the proprietors, who fixed both the retail and wholesale prices on their goods, and took direct contracts from the retailers as well as the wholesalers, requiring them not to sell below such prices.

Under none of these plans were the prices of proprietary medicines unreasonably increased. They were never advanced beyond the retail prices marked on the goods by the proprietors themselves and in fact, the retailers sold considerably below such prices in the great majority of cases.

Violation of the Sherman Anti-Trust Law

Unfortunately, however, some mistakes occurred in the operation of the "tripartite plan," the principal one being the effort of the retailers, through a so-called "honor roll," to persuade jobbers to refuse goods of every kind to "aggressive cutters." This led to excesses which occasionally took on the appearance of an attempt at tyranny, and the result was that the government brought a suit against the proprietors, wholesalers and retailers, on a charge of combination or conspiracy to restrain trade in violation of the Sherman anti-trust law. As the outcome of this suit, the United States Circuit Court, at Indianapolis, issued a decree forbidding any

further co-operation between the three branches of the trade in carrying out any plans for the sale of goods, and even enjoining the wholesalers and retailers, through their respective associations, from making any effort to secure the adoption by proprietors of plans for the maintenance of their prices. But the decree does not deny the right of a manufacturer to adopt and enforce any plan he may choose for the sale of his own goods, provided his action is individual and not in combination with any other person or association.

While some errors were made in the attempt to improve the deplorable conditions existing in the retail drug trade, they were due to an excess of zeal and there was no intention on the part of any one concerned to violate the law. It was a great injustice to designate as a "drug trust" the trade arrangments which existed among the manufacturers, wholesalers and retailers for the sale of proprietary articles. On the contrary, these arrangements were directly opposed to the "trust" idea. Their object was simply to establish uniform selling prices which provided only a fair margin of profit, so that the thousands of small dealers could continue in business, instead of being driven out by the comparatively few "aggressive cutters," whose methods tended to monopolize the business in their own hands.

Until the government suit was brought against the drug interests it had always been supposed that the Sherman anti-trust law was intended for the protection of the many against the few. It was used, however, to produce exactly the opposite result in this case. It was also humiliating that the whole drug trade of the United States should be branded as conspirators and lawbreakers because they were parties to trade arrangements which had always been considered proper until the Sherman law was invoked. It has been truly said that it is not possible to indict a whole nation, but now our own government has enjoined a whole trade, because the number of druggists who had not signed the contracts was so small as to be practically negligible.

The Sherman law is such a broad one that the injunction in the government suit completely tied the hands of the two large associations existing in the wholesale and retail branches of the drug trade, and prevents either of them from making any organized effort to obtain protection from the manufacturers whose goods they handle. It can hardly be conceived that the law was ever

intended to work such a great hardship upon thousands of good citizens engaged in the same line of business. Unless this law is so amended as to permit reasonable agreements which are beneficial to commerce, and which do not conflict with the public welfare in any way, the business men of this country will undoubtedly be placed at a great disadvantage. If this law should be literally applied, it will cause the greatest possible restraint of trade, although it was intended to prevent that condition. Reasonable agreements do not restrain trade, but promote it.

Possible Scope of the Sherman Act

Should the Sherman law be pushed to its logical conclusion, the merchants and manufacturers, who are being held to a strict accountability under it, are not the only class of citizens whom it will involve. For instance, it is well known that the farmers, through their associations, fix the price of cotton, and perhaps other commodities produced by them. According to the newspapers, such associations have not only established minimum selling prices on cotton, but have arranged for storing and holding the crops until purchasers are compelled to buy at the prices fixed by them. Labor unions have also been actively engaged for many years in making agreements with their employers, fixing the price of labor, regulating the hours of work, etc. It is hardly necessary to refer to the many strikes and boycotts which have been inflicted upon the country, often with serious results to the public interest, as they are matters of common knowledge. Once the toiling and voting masses of the nation realize that their own interests are threatened by the Sherman law, it is easy to conceive that our national legislators will no longer fail to appreciate the necessity of correcting its defects.

European Law on Merchants' and Manufacturers' Associations

In striking contrast to the restrictions imposed by the Sherman law in our country, it is enlightening to observe what absolute freedom of trade is permitted by the governments of other countries, notably England, France and Germany, which place practically no legal restrictions upon agreements regulating the prices and sale of goods. Through the courtesy of the Department of State at Washington, a series of questions, prepared by me, were

answered by the American consuls in more than fifty of the principal cities in the three countries named. These consular reports show that Great Britain, France and Germany have never undertaken to prevent or interfere with proper trade agreements. On the contrary, the widest latitude seems to be allowed manufacturers and dealers, among whom numerous combinations exist, especially in England and Germany, to secure the maintenance of prices and terms.

In our own country, however, the Sherman anti-trust law is so sweeping that it makes illegal every contract or combination in restraint of trade. Even if the contract or agreement is a reasonable one and does not menace the public welfare in any way, it is nevertheless prohibited by this law.

As a matter of curiosity, it is interesting to refer to a "Catalogue of Drugs, Medicines and Chemicals sold wholesale and retail by Jacob Schieffelin, 193 Pearl Street, New York," published more than one hundred years ago. This old price list was printed in 1804, and it bears the following official endorsement: Examined and approved by the New York Druggists' Association, New York, August 6th, 1806. By order, Henry H. Schieffelin, Secretary." It would seem that it was entirely lawful in those early days for merchants to form an association and agree upon the prices to be charged by its members.

There is a pressing need of congressional legislation which will make it lawful to enter into reasonable and proper trade agreements, for without such agreements it is difficult to meet the complex conditions of modern business. The Sherman anti-trust act was no sudden legislation, as it was introduced nearly two years before it was passed and was the subject of exhaustive discussion. Yet Senator Sherman said his act was a law in "general terms" to be modified by subsequent legislation.

It is generally believed that the fixing of insurance rates by agreement of the underwriters is an advantage to the public, nor have I heard much criticism of the action of the Clearing House Association in fixing the fee to be charged for collecting out-of-town checks, and imposing a penalty for a violation of the terms; yet mercantile agreements are analogous. Merchants should be allowed to attach to any purchase or sale any conditions that are not contrary to public policy.

Unjustifiable conditions or agreements are those which tend to control the markets for speculative purposes, or to create a monopoly and eliminate legitimate competition, so that merchandise could be sold at extortionate prices, but justifiable agreements are those which tend to protect from a ruinous fluctuation of prices owing to a needless competition. Therefore the law should be amended to legalize agreements in justifiable restraint of interstate trade which have a reasonable or laudable purpose, and which are filed with the Department of Commerce. Publicity would thus be secured and any question as to whether the agreement was justifiable could be tried in the federal courts.